MICHIGAN SUPREME COURT

Office of Public Information

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CASE OF WOMAN WHO LEFT CHILDREN IN CAR TO BE HEARD BY SUPREME COURT THIS WEEK; COURT TO ALSO HEAR DATE-RAPE DRUG DEATH AND CASINO CASES

LANSING, MI, March 8, 2004 – The case of a woman whose two children died in a hot car will come before the Michigan Supreme Court next week for oral argument.

In *People v. Maynor*, the prosecutor appeals a Michigan Court of Appeals ruling that first-degree child abuse is a specific intent crime. Defendant Tarajee Maynor, the mother who left the children in the car, was charged with two counts of first-degree felony-murder, with first-degree child abuse being the underlying felony. The Court of Appeals ruled that the first-degree child abuse statute requires doing an act with the intent to cause physical or mental harm. Maynor has argued that she acted negligently and did not intend for the children to die.

The Court will also hear *People v. Holtschlag*, *People v. Cole*, *People v. Brayman*, and *People v. Limmer*. Three of the four defendants were convicted of involuntary manslaughter in the 1999 death of 14-year-old Samantha Reid, who slipped into a coma and died after she unknowingly ingested the drug GHB, known as the date-rape drug. The Court will consider whether the evidence was sufficient to support an involuntary manslaughter conviction. A fourth defendant, Erick Limmer, was convicted of being an accessory to manslaughter. The Wayne County Prosecutor's Office appealed to the Supreme Court after the Court of Appeals vacated the manslaughter and accessory convictions last year.

Also before the Court is *Taxpayers of Michigan Against Casinos v. State of Michigan*, which involves a non-profit group's challenge to the state's compacts with several Indian tribes covering gambling on tribal lands. The Legislature approved the compacts by concurrent resolution. The plaintiffs argue that the compacts are invalid under the Michigan Constitution because they amount to legislation and should have been approved by a legislative bill.

The Court will also hear arguments in *Breighner v. Michigan High School Athletic Association*, in which parents of a high school athlete seek to obtain documents from the MHSAA under the Freedom of Information Act. Also before the Court are 11 other cases, involving tax, medical malpractice, employment discrimination, personal injury, insurance, and criminal issues.

Court will be held on **March 9, 10, and 11.** Court will convene at **9:30 a.m.** each day.

(*Please note: The summaries that follow are brief accounts of complicated cases and might not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. For further details about these cases, please contact the attorneys. Briefs in these cases may be viewed on the Michigan Supreme Court's website at* http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm.)

Tuesday, March 9
Morning session

PEOPLE v. RUSSELL (case no. 122998)
Prosecuting attorney: Gary A. Moore/(616) 336-3577
Attorney for defendant Lord Shawn Russell: Jacqueline J. McCann/(313) 256-9833
Trial court: Kent County Circuit Court
At issue: The defendant in this criminal case asked the trial judge to remove his assigned attorney and appoint another lawyer. The court refused to do so, stating that there was no good reason to remove the lawyer. Ultimately, the defendant represented himself. Did the trial judge properly consider the defendant's request for self-representation? May a defendant waive the representation issue by his or her conduct, or must the waiver be verbal?
Background: Lord Shawn Russell was arrested after sheriff's deputies found cocaine and heroin in his car. The court assigned an attorney to Russell under MCR 6.005(D). MCR 6005(D) provides that, in criminal cases, "If the court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment." At trial, Russell indicated to the trial judge several times that he wanted his assigned trial attorney removed and new counsel appointed. The trial judge stated that he did not find any valid reason for removing the attorney. The judge went on to tell Russell of his options: he could hire his own counsel, represent himself, continue with his current attorney, or represent himself with the lawyer available for consultation. The judge also warned Russell that it was not wise for Russell to represent himself. Ultimately, after more discussion, the trial judge said that when they reconvened the trial, if Russell wished, the judge would announce to the jury that Russell was representing himself. When the court reconvened, the trial judge did not ask Russell whether he wanted to represent himself, but told the jury that Russell had chosen to represent himself. Russell commented to the jurors, "I'm being forced into this situation …. I requested the Court appoint new counsel for me, and they said, for some reason being that we're here and they don't see the difference …. So they forced me to go on with this trial alone by myself." The trial went forward with the attorney available to advise Russell. The jury convicted Russell of possession with intent to deliver less than 50 grams cocaine and possession with intent to deliver less than 50 grams of heroin. He was sentenced to consecutive prison terms of two and a half to 40 years on each count. In a published per curiam opinion, the Court of Appeals affirmed Russell's convictions. The Court of Appeals stated that "defendant's conduct and refusal to accept representation by appointed counsel constituted a knowing and intelligent waiver of his constitutional right to counsel." The Court of Appeals agreed with the trial court's conclusion that Russell had not provided a good reason to replace his attorney and stated that Russell, by his own conduct, demonstrated that he wanted to proceed on his own. Russell appeals. He argued that he repeatedly told the court that he wanted counsel and never stated that he wanted to

represent himself. Russell was indigent throughout the case and was entitled to have a court-appointed lawyer represent him, he contends.

PEOPLE v. WILLIAMS (case no. 123537)
Prosecuting attorney: Jon P. Wojtala/(313) 224-5796
Attorney for defendant Rodney Williams: Susan M. Meinberg/(313) 256-9833
Trial court: Wayne County Circuit Court
At issue: A defendant in a criminal case may waive the right to counsel; the trial court must first question the defendant to ensure that the waiver is unequivocally, knowingly, intelligently, and voluntarily made. Here, the trial judge informed the defendant of the charges and the maximum sentence for each charge, advised him of the risks involved, warned him that he would not be allowed to disrupt the proceedings, and questioned him about whether he actually wished to represent himself. Did the trial judge properly consider the defendant's request for self-representation? May a defendant waive the representation issue by his or her conduct, or must the waiver be verbal?
Background: Rodney Williams was charged with felony murder, armed robbery, and felony-firearm. During trial, Williams told the judge that he did not want his appointed attorney to represent him. The judge warned Williams about the dangers of self-representation and that, under the rules of evidence, he might not be able to introduce some evidence that he wanted to present. She also informed him of the charges and the maximum sentence for each charge and cautioned him that he would not be allowed to disrupt the proceedings. The judge also stated that Williams' counsel was his second appointed attorney and that he would not get another one. Williams stated that he was ready and would rather represent himself. Williams said in part that his appointed attorney had failed to question a prosecution witness. This prosecution witness, Williams said, had stated at the preliminary examination that he was only 50 percent sure that Williams was one of the perpetrators. The prosecutor responded that Williams had misrepresented the transcript. Williams asked the judge for an opportunity to examine the transcript. The judge refused and ordered Williams to state whether he was going to represent himself. Williams, after being asked twice, said "Yes, ma'am." The jury convicted Williams as charged. The trial court vacated the armed robbery charge and Williams was sentenced to the mandatory terms for felony murder and felony-firearm. The Court of Appeals majority reversed Williams' convictions in a 2-1 unpublished decision. The majority suggested that Williams might have decided to continue with his attorney if he had been allowed to read the preliminary examination transcript. As a result, the majority said, "we find that defendant's request was denied without due deliberation and without affording him the opportunity to be properly informed before making his decision….Such a cursory handling of defendant's request violated defendant's right to have the proceeding conducted so as to ensure 'that he knows what he is doing and his choice is made with eyes open.'" The dissenting judge found that the trial court had fully complied with the necessary case law and had properly found that Williams had knowingly waived his right to counsel. The prosecution appeals.

PEOPLE v. HOLTSCHLAG (case no. 123553)
PEOPLE v. COLE (case no. 123554)
PEOPLE v. BRAYMAN (case no. 123555)
PEOPLE v. LIMMER (case no. 123556)
Prosecuting attorney: Olga Agnello/(313) 224-5787

Attorney for defendant Nicholas E. Holtschlag: David R. Cripps/(313) 963-0210
Attorney for defendant Joshua M. Cole: Richard B. Ginsberg/(734) 213-0918
Attorney for defendant Daniel Brayman: Gary L. Rogers/(313) 256-9833
Attorney for defendant Erick Limmer: Mark Procida/(313) 729-5612
Trial court: Wayne County Circuit Court
Issue: Where the defendants were prosecuted for involuntary manslaughter, was it necessary for the prosecution to prove that the defendants committed a lawful act in a grossly negligent fashion? The underlying act in this case – that of lacing the victims' drinks with GHB – was a felony. The Court of Appeals reversed the defendants' manslaughter convictions, stating that the defendants could not be convicted of involuntary manslaughter under a gross negligence theory, because the underlying act was unlawful.
Background: During the night of Saturday, January 16, 1999, three of the defendants, Joshua Cole (18 years old), Daniel Brayman (18 years old), and Nicholas Holtschlag (17 years old), were watching television, drinking, and smoking marijuana with three 14-year-old girls – Samantha Reid, Melanie Sindone, and Jessica VanWassehnova. The group spent the evening at the home of the fourth defendant, Erick Limmer (25 years old). At least one of the four defendants liberally dosed the girls' drinks with GHB, known as the "date-rape drug" or with its counterpart GBL. Reid died as a result, while Sindone slipped into a coma but recovered after receiving medical treatment. After a five-week jury trial in Wayne County Circuit Court, Brayman and Holtschlag were convicted of involuntary manslaughter and two counts of the lesser included offense of mixing a harmful substance in a drink. Cole was convicted of involuntary manslaughter and two counts of mixing a harmful substance in a drink. Limmer was convicted of accessory after the fact to manslaughter, mixing a harmful substance in a drink, delivery/manufacture of marijuana, and possession of GHB. All four defendants appealed their convictions. In an unpublished per curiam opinion, the Court of Appeals reversed the manslaughter convictions, as well as Limmer's conviction as an accessory after the fact. The Court of Appeals held that the evidence was legally insufficient. Because defendants were convicted of mixing a harmful substance -- an unlawful act and felony -- they could not be convicted of involuntary manslaughter under a gross negligence theory, which required evidence of a lawful act committed in a grossly negligent fashion. The Court of Appeals affirmed all other convictions.

The prosecutor appeals, asking the Supreme Court to reinstate the manslaughter and accessory after the fact convictions. In its brief, the prosecution argues that "the prosecution *need not* show that the act that caused death was unlawful in itself, but is not *defeated* if in fact the proofs show that the act that caused death, which was committed in a grossly negligent manner, *was* itself unlawful (even felonious)."

Afternoon session

PEOPLE v. CLAYPOOL (case no. 122696)
Prosecuting attorney: John H. Pallas/(248) 858-0656
Attorney for defendant Deon Lamont Claypool: Mark S. Bosler/(248) 647-8180
Trial court: Oakland County Circuit Court
At issue: The defendant was sentenced to a minimum of eight years for delivery of 50 to 224 grams of cocaine – two years less than the statutory 10-year minimum for that offense. Did the trial judge give "substantial and compelling" reasons for departing from the mandatory minimum

sentence imposed by statute? Is "escalation" of the offense by police a reason to depart from the statutory minimum?

Background: Deon Lamont Claypool sold cocaine to undercover officers three times over a period of nine days. The first two sales involved less than 50 grams of cocaine; the third and last sale was for four and a half ounces, over 50 grams. Claypool pled guilty to a number of criminal charges, including one count of delivery of 50 to 224 grams of cocaine. MCL 333.7401(2)(a)(iii) provides that a person convicted of this offense "is guilty of a felony and shall be imprisoned for not less than 10 years nor more than 20 years." The statute also states that "The court may depart from the minimum term of imprisonment … if the court finds on the record that there are substantial and compelling reasons to do so." Claypool's attorney argued that there were substantial and compelling reasons for departing from the 10-year minimum. Claypool's counsel pointed out that Claypool was 26 years old at the time of the offense, had been employed as a cab driver since 1998, and had only one minor criminal offense on his record. The attorney also argued that the undercover officer kept coming back to defendant, and paid him $500 over and above the cost of the drugs as an inducement. Therefore, defense counsel argued, the police induced Claypool to sell more cocaine to increase his prison sentence. The prosecutor responded that the officers were trying to build Claypool's trust by buying increasing quantities of cocaine, and that their investigation was aimed at finding out how important a drug dealer Claypool was. In sentencing Claypool to 8 to 20 years, the judge noted Claypool's age, record, and employment history, adding "it is unfortunate that you weren't arrested and charged originally because perhaps you would have been able to receive some treatment." The judge also commented that Claypool's offense was "escalated" by the series of drug buys. The prosecutor appealed the sentence; the Court of Appeals affirmed in an unpublished opinion. The prosecutor appeals, arguing that the trial judge's decision was not supported by "substantial and compelling reasons."

NEAL v. WILKES (case no. 122498)

Attorney for plaintiff Julie Neal: Traci M. Kornak/(616) 458-8000

Attorney for defendant Terry Wilkes: David M. Pierangeli/(616) 977-9200

Trial court: Eaton County Circuit Court

At issue: The plaintiff was injured while riding an all-terrain vehicle on a twelve-acre lot zoned as residential land. She sued for her injuries, but the defendant contends that the Recreational Use Act (RUA) bars her claims. But a 1987 Michigan Supreme Court decision, *Wymer v. Holmes,* states that the RUA does not apply to urban, suburban, and subdivided lands. Should *Wymer* be overruled?

Background: Julie Neal injured her back while riding as a passenger on Terry Wilkes' all-terrain vehicle (ATV) on his property in the Village of Dimondale. Although the twelve-acre lot contained wooded areas, Neal's injury occurred on Wilkes' lawn. According to the township supervisor's affidavit, defendant's property was zoned as single family residential. The property was both subdivided and improved and was properly classified as either urban or suburban land. The trial granted Wilkes' motion for summary judgment and dismissed Neal's claim, finding the Recreational Use Act (RUA) prevented her from pursuing a cause of action against Wilkes. The Recreational Use Act provides in part that "Except as otherwise provided in this section, a cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other

outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee." MCL 324.73301(1). The Court of Appeals reversed in an unpublished per curiam opinion. The Court of Appeals, citing the Michigan Supreme Court's decision in *Wymer v. Holmes*, 429 Mich. 66 (1987), said that the RUA did not apply to residential property. Wilkes appeals.

ALLSTATE INSURANCE COMPANY v. MCCARN, et al. (case no. 122849)
Attorney for plaintiff Allstate Insurance Company: Joseph T. Collison/(989) 799-3033
Attorney for defendant Nancy S. Labelle, Personal Representative of the Estate of Kevin Charles Labelle, Deceased: Timothy J. Donovan/(517) 394-7500
Trial court: Shiawassee County Circuit Court
At issue: While living with his grandparents, a 16-year-old shot and killed his friend in the grandparents' house. The teens were apparently playing with the gun and believed that it was unloaded. Is the incident covered by the grandparents' homeowner's policy -- and is their insurance company obligated to defend them in a lawsuit brought by the dead teenager's estate? Does the incident fall under the policy's criminal acts exclusion?
Background: Sixteen-year-old Kevin LaBelle was shot by Robert McCarn, the grandson of Ernest and Patricia McCarn, at the McCarns' home. In both his statement to the police and his deposition testimony, Robert McCarn stated that he thought the gun was unloaded and would simply "click" when the trigger was pulled. McCarn acknowledged, however, that he did not check the gun to see that it was unloaded before pulling the trigger. Allstate Insurance Company, which issued the grandparents' homeowners' policy, filed suit, seeking a ruling that it was not liable to pay damages or defend the McCarns in a lawsuit brought against them by LaBelle's estate. Allstate cited the policy's intentional or criminal acts exclusion, which states, "We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person. This exclusion applies even if: a) such insured person lacks the mental capacity to govern his or her conduct; b) such bodily injury or property damage is of a different kind or degree than intended or reasonably expected; or c) such bodily injury or property damage is sustained by a different person than intended or reasonably expected.

This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime." The Court of Appeals, in an unpublished per curiam opinion, concluded that McCarn's actions constituted manslaughter because, regardless of his belief that the gun was unloaded, McCarn intentionally pointed the gun at the victim's face and intentionally pulled the trigger. A person should reasonably expect that pointing a gun at another will probably cause injury or death, the majority continued. Accordingly, the criminal acts exclusion applied, the majority said. The dissenting judge contended that the criminal acts exclusion would not apply if McCarn thought the gun was unloaded. LaBelle's estate appeals.

Wednesday, March 10
Morning session

CRAIG v. OAKWOOD HOSPITAL, et al. (case nos. 121405, 121407-9, 121419)
Attorney for plaintiff Antonio Craig: Mark L. Silverman/(248) 647-0390
Attorney for defendant Henry Ford Hospital: Susan Healy Zitterman/(313) 965-7905

Attorney for defendants Associated Physicians, P.C., and Elias G. Gennaoui, M.D.: John P. Jacobs/(313) 965-1900
Attorney for defendant Oakwood Hospital: Barbara H. Erard/(313) 223-3500
Attorneys for amicus curiae The American College of Obstetricians and Gynecologists: Robert G. Kamenec/(248) 901-4000, Mark A. Stinnett, Phillip M. Remington/(214) 954-2200
Attorneys for amicus curiae The Defense Research Institute and Michigan Defense Trial Counsel: Mary Massaron Ross/(313) 983-4801, Thomas R. Meagher/(517) 371-8161
Trial court: Wayne County Circuit Court
At issue: The plaintiff in this medical malpractice case claims that his cerebral palsy was caused by a drug overdose given to his mother during labor, and by medical personnel's failure to adequately monitor his fetal heart rate. The issues pertain to the testimony offered by plaintiff's expert witnesses and recovery under a theory of successor liability.
Background: This is a medical malpractice case in which Antonio Craig, who is now an adult, was diagnosed with cerebral palsy at age 13. He sued, claiming that that the health care professionals who attended his mother during his birth administered an overdose of oxytocin and that doctors failed to adequately monitor his fetal heart rate. Following a five-week trial, the jury returned a verdict of nearly $21 million in plaintiff's favor. After a subsequent bench trial, the trial judge determined that defendant Henry Ford Health System was liable as a successor corporation to defendant Associated Physicians. The trial court denied the defendants' motions for judgment notwithstanding the verdict and for new trial. In a published opinion, the Court of Appeals affirmed on all issues, except for Henry Ford Health System's challenge to the amount of Craig's award for lost wage-earning capacity.

Each of the defendants appeals. They argue that the evidence Craig presented at trial was not sufficient to show that his cerebral palsy was caused by the defendants' actions. The trial court should have barred testimony by the plaintiffs' expert witnesses, the defendants argue, because the witnesses' testimony was not based in fact or any recognized scientific theory. Henry Ford Health System also contends that it is not liable fordamages under a successor liability theory.

DESHAMBO, et al. v. ANDERSON, et al. (case nos. 122939, 122940)
Attorney for plaintiff Robert F. DeShambo: Theodore F. Fulsher/(906) 226-6149
Attorney for intervening plaintiffs Attorney General, Department of Community Health, and State of Michigan: Joel D. McGormley/(517) 373-7700
Attorney for defendants Norman R. Nielsen and Pauline Nielsen: Dale L. Arndt/(616) 365-9600
Attorneys for amicus curiae International Association of Bridge, Structural, Ornamental, & Reinforcing Iron Workers: Richard L. Steinberg, Donald C. Wheaton, Jr./(313) 962-3738
Trial court: Leelanau County Circuit Court
At issue: In general, an employer of an independent contractor is not liable for the independent contractor's acts. There is an exception to that rule where the contracted work is considered "inherently dangerous." Is timber cutting an inherently dangerous activity?
Background: Norman and Pauline Nielsen hired Charles Anderson to clear brush and harvest small poplar trees from their property. Anderson, in turn, hired Robert DeShambo to help him. DeShambo was paralyzed when a tree felled by Anderson struck him in the shoulder, causing another felled tree to strike DeShambo in the back. DeShambo sued the Nielsens, claiming that cutting timber was an inherently dangerous activity and that the Nielsens owed him a duty to

conduct such activities in a reasonable and safe manner. DeShambo also argued that the Nielsens could not delegate this duty to Anderson. The State of Michigan intervened as a plaintiff to recover funds that it paid and expected to pay to DeShambo through the Medicare program. The trial court granted the Nielsens' motion for summary disposition and dismissed the case. The trial judge found that Norman Nielsen was not a sophisticated landowner who would be knowledgeable about the risks involved in cutting timber. Therefore, the inherently dangerous doctrine attaching liability to property owners did not apply, the judge concluded. In an unpublished per curiam opinion, the Court of Appeals reversed. It held that the determination whether logging is inherently dangerous is a question for the jury because the plaintiffs presented evidence concerning the hazardous elements of logging. The Nielsens appeal.

ORMSBY v. CAPITAL WELDING, et al. (case nos. 123287 & 123289)
Attorney for plaintiffs Ralph Ormsby and Kimberly Ormsby: Patrick Burkett/(248) 355-0300
Attorney for defendant Capital Welding, Inc.: Joseph J. Wright/(248) 827-3834
Attorney for defendant Monarch Building Services, Inc.: Michael M. Wachsberg/(248) 363-6400
Attorneys for amicus curiae International Association of Bridge, Structural, Ornamental, & Reinforcing Iron Workers: Richard L. Steinberg, Donald C. Wheaton, Jr./(313) 962-3738
Attorneys for amicus curiae Michigan Chapter, Associated General Contractors and Associated General Contractors, Greater Detroit Chapter: Kevin S. Hendrick, Paul C. Smith/(313) 965-8300
Attorneys for amicus curiae Michigan Manufacturers Association: F.R. Damm, Paul C. Smith/(313) 965-8300
Attorney for amicus curiae Michigan Regional Council of Carpenters: Nicholas R. Nahat/(248) 354-0380
Trial court: Oakland County Circuit Court
At issue: The general rule is that a general contractor is not liable for the acts of an independent contractor. The case raises issues about the retained control and common work area exceptions. Are these separate exceptions? Should a common-work-area claim proceed against both the general contractor and a subcontractor, and a retained-control claim proceed against the subcontractor?
Background: Ralph Ormsby, who was employed by Abray Steel Erectors, was injured when a structure he was working on collapsed. Monarch Building Services was the general contractor on the project, while Capital Welding was subcontracted to erect steel supports in the building. Capital subcontracted the work to Abray Steel. Ormsby sued Monarch and Capital. As a general rule, a general contractor is not liable for the acts of independent contractors. Ormsby argued in part that Monarch and Capital were liable because he was injured in a "common work area" used by employees of other subcontractors. He also argued that, despite subcontracting to Abray, Capital retained control of the worksite. Capital moved to dismiss the case; the trial court granted the motion. The Court of Appeals reversed the trial court in a published opinion, allowing Ormsby to proceed with his retained control and common work area claims. Generally, the employer of an independent contractor is not liable for harm caused to another by the subcontractor or its servants, the Court of Appeals noted. But there are a number of exceptions, including the "retained control" and "common work area" exception, the court noted. The Court of Appeals recognized that with "respect to the retained control and common work area

exceptions, this Court has applied them as two separate exceptions, but also as a single exception." In some earlier opinions, the Court of Appeals had held that the doctrine of retained control applies only in situations involving common work areas, the court noted. The Court of Appeals concluded that retained control and common work area are two separate exceptions, and that there was a genuine issue of material fact as to whether Capital retained control of the project. With Monarch, however, the Court of Appeals held that no retained control exception applied as plaintiff had not shown that Monarch had anything other than general oversight of the project. In regard to the common work area exception, the Court of Appeals noted that evidence showed that others would be or were working in the area where Ormsby was injured. The Court of Appeal held this claim could proceed against both Monarch and Capital. Monarch and Capital appeal.

Afternoon session

PEOPLE v. MAYNOR (case no. 123760)
Prosecuting attorney: Anica Letica/(248) 452-9178
Attorney for defendant Tarajee Shaheer Maynor: Elbert L. Hatchett/(248) 334-1587
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Timothy A. Baughman/(313) 224-5792
Trial court: Oakland County Circuit Court
At issue: Is first-degree child abuse a specific-intent crime? The first-degree child abuse statute, MCL 750.136b(2), provides that "A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." The defendant contends that she did not "knowingly or intentionally" harm her children.
Background: On a hot day in June 2002, Tarajee Maynor allegedly left her two children unattended in her car while she visited a beauty salon for about three and a half hours. The children, ages ten months and three years, died of hyperthermia. Maynor was charged with two counts of first-degree felony-murder, with first-degree child abuse being the underlying felony. But the district court bound Maynor over on two counts of involuntary manslaughter. The district court judge held that there was insufficient evidence that Maynor knew her actions would cause her children's deaths; therefore, there was no evidence of first-degree child abuse to support the charges of felony-murder. He determined that involuntary manslaughter was the appropriate charge. The circuit court reinstated the original charges, holding that first-degree child abuse is a general intent crime. To meet the definition of first-degree child abuse, the circuit judge said, "the People are required to establish defendant had the intent to perform the physical act itself that resulted in the death of her children." Maynor's intent could be inferred from her actions, the circuit judge concluded. In a published opinion, the Court of Appeals majority held that first-degree child abuse is a specific intent crime. The majority upheld, however, the reinstatement of the felony-murder charges, saying that there was sufficient circumstantial evidence from which a jury could infer that Maynor intended to harm her children. The dissenting judge agreed with the circuit court that first-degree child abuse is a general intent crime. The prosecution appeals.

PEOPLE v. DERRING (case no. 120696)
Prosecuting attorney: Douglas E. Ketchum/(269) 673-0280
Attorney for defendant Jamasa Z. Derring: Elliot D. Margolis/(248) 547-7888
Trial court: Allegan County Circuit Court

At issue: The defendant in this case allegedly killed three people; the prosecution's theory is that he did so to prevent one of the victims, his accomplice, from telling others about another murder the defendant committed. At trial, four people who heard the victim discuss the earlier crime testified about the victim's statements. Did the trial court err in permitting their testimony to be admitted into evidence?

Background: On April 1, 1999, teenagers Dustin Sherrell, Darla Sherrell and Jonathan Edwards, all close friends of Jamasa Derring, were shot to death. The prosecution's theory was that Derring shot the three victims in order to prevent them from telling others about his involvement in the murder of Antonio Flores, who was shot in an apparent robbery on February 20, 1999. In the weeks following the Flores shooting, Dustin Sherrell allegedly made statements to three witnesses, and a statement in the presence of a fourth witness, about the Flores shooting, indicating that he and Derring had committed that crime. The prosecution asked for the statements to be admitted in order to establish Derring's motive for killing the three victims. Derring's counsel argued that the four witnesses should not be allowed to present Sherrell's hearsay statements because the statements were highly prejudicial and were not sufficiently trustworthy. Defense counsel contended that Sherrell made the statements in an effort to shift blame for the Flores murder to Derring. But the court ruled that Sherrell's statements could be admitted under Michigan Rule of Evidence (MRE) 804(B)(6), the so-called "catchall provision" to the hearsay rule. MRE 804(B)(6) provides that a statement that is not specifically covered by any of the hearsay exceptions, but has equivalent guarantees of trustworthiness, may be admitted if the court determines that the statement is offered as evidence of a material fact. The trial judge said in part that, with one exception, the statements "all appear to have been spontaneously made without being prompted by anyone or thing" and "were consistent repetitions." In addition, all the witnesses described Dustin Sherrell "as being upset, afraid, incredulous that Defendant shot Flores….Taken together, they are consistent with a youngster disturbed who needed to deal with his emotions, consistent in content, and having a ring of trustworthiness…." The Court of Appeals affirmed the trial court's ruling in an unpublished per curiam opinion. Derring appeals.

Thursday, March 11
Morning session

TAXPAYERS OF MICHIGAN AGAINST CASINOS, et al., v. STATE OF MICHIGAN, et al. (case no. 122830)

Attorney for plaintiffs Taxpayers of Michigan Against Casinos and Laura Baird: William C. Fulkerson/(616) 752-2000

Attorney for defendant State of Michigan: Thomas F. Cavalier/(313) 965-9725

Attorney for intervening defendants North American Sports Management Company, Inc., IV, and Gaming Entertainment, LLC.: Kristine N. Tuma/(517) 374-9162

Attorneys for amicus curiae Grand Traverse Band of Ottawa and Chippewa Indians, Hannahville Indian Community, Keweenaw Bay Indian Community, Lac Vieux Desert Band of Lake Superior Chippewa Indians, and Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians: Matthew L.M. Fletcher, John F. Petoskey/(231) 271-7279, Dawn S. Duncan, Anthony Mancilla/(906) 466-2934, Chad DePetro/(906) 353-7031, Jennifer Bliss/(402) 333-4053

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Attorneys for amicus curiae Sault Ste. Marie Tribe of Chippewa Indians: Kevin J. Moody, Jaclyn Shoshana Levine/(517) 487-2070
Attorneys for amicus curiae City of New Buffalo and New Buffalo Township: Harold Schuitmaker/(269) 657-3177, David M. Peterson/(269) 983-0191
Attorneys for amicus curiae Grand Rapids Area Chamber of Commerce: Bruce W. Neckers, Bruce A. Courtade/(616) 235-3500
Attorneys for amicus curiae Senate Majority Leader Ken Sikkema and Senator Shirley Johnson, Appropriations Chair: Michael G. O'Brien, Alfred H. Hall/(517) 373-3330
Trial court: Ingham County Circuit Court
At issue: The Governor negotiated compacts with several Indian tribes covering gambling on tribal lands. The Legislature approved the compacts by concurrent resolution. Are the compacts invalid under the Michigan Constitution because they were not approved by bill? Are the compacts legislation, or are they in the nature of contracts?
Background: In 1998, the Governor reached an agreement with four Indian tribes on compacts to permit casino gambling on lands the tribes own in a number of western Michigan counties. On December 10, 1998, the House and Senate adopted House Concurrent Resolution (HCR) No. 115 approving the compacts. On June 10, 1999, Taxpayers of Michigan Against Casinos, a non-profit corporation, and Laura Baird, then a state representative who voted against the compacts, filed a lawsuit in Ingham County Circuit Court. They sought a ruling that the compacts violated the Michigan Constitution. The plaintiffs argued in part that the compacts were legislation that had not been approved in accordance with constitutional requirements, and that the terms of the compacts violated separation of powers. The plaintiffs argued that HCR No. 115 constitutes legislation because it significantly affects public policy, supplants and amends existing state laws, and creates new rules and imposes additional duties that are binding on those outside the Legislature. The defendants responded that approving the compacts was not a legislative act because the tribes' operations are not subject to the Legislature's control. Similarly, the compacts are not legislative because they are contracts which required the approval of both the state and the tribes, whereas legislation only requires action by the Legislature, the defendants contended. The circuit court disagreed, declaring that HCR 115 was legislation enacted through unconstitutional means and that the terms of the compacts violated separation of powers by giving the Governor unrestricted authority to amend their terms. The Court of Appeals reversed in a published opinion. The plaintiffs appeal.

BREIGHNER v. MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION (case no. 123529)
Attorney for plaintiffs Martin B. Breighner, III, and Kathryn Breighner: Wayne Richard Smith/(231) 526-1684
Attorney for defendant Michigan High School Athletic Association, Inc.: Edmund J. Sikorski, Jr./(734) 677-2110
Attorney for amicus curiae Michigan Press Association: Dawn Phillips Hertz/(734) 213-3612
Attorneys for amicus curiae Michigan Society Association Executives: Beverly Holaday, Kevin C. O'Malley/(616) 336-6000
Trial court: Emmet County Circuit Court
At issue: Is the Michigan High School Athletic Association a public body subject to the Freedom of Information Act?

Background: Martin and Kathryn Breighner's son was a member of the Harbor Springs ski team. Harbor Springs is a member of the Michigan High School Athletic Association (MHSAA) and is subject to its regulations. The Breighners' son participated in a "non-sanctioned" event in Canada, which put him over the limit for "non-sanctioned" events. He was therefore prohibited from competing in a MHSAA meet. The plaintiffs sought information from the MHSAA pursuant to the Freedom of Information Act (FOIA), but were dissatisfied with MHSAA's response. They sued, seeking a ruling that the MHSAA was a "public body," that the documents they requested were not exempt from FOIA, and that the MHSAA violated FOIA. Michigan's FOIA provides that a "public body" is subject to FOIA. The statute defines "public body" to include "Any other body which is created by state or local authority or which is primarily funded by or through state or local authority." The circuit court judge granted summary disposition in favor of the plaintiffs, finding that the MHSAA was a "public body" because most of its funding came from "gate receipts at the athletic tournaments it sponsors" at public schools. In a published decision, the Court of Appeals reversed. A majority of the panel found that the MHSAA "is a unique entity that was not 'created' or 'cause[d] to come into being' by state or local authority." The majority also concluded that the state did not fund the MHSAA's activities and that the MHSAA was not an agent of the state. The dissenting judge said in part that the MHSAA could not receive funding without "the participation of the high schools," particularly the public schools. The plaintiffs appeal.

GARG v. MACOMB COUNTY COMMUNITY MENTAL HEALTH, et al. (case no. 121361)

Attorney for plaintiff Sharda Garg: Monica Farris Linkner/(734) 214-0200

Attorney for defendant Macomb County Community Mental Health: Susan H. Zitterman/(313) 965-7905

Trial court: Macomb County Circuit Court

At issue: The plaintiff is of Indian (India) ancestry. She sued, alleging national-origin discrimination and retaliation against her for opposing sexual harassment and filing a grievance alleging national-origin discrimination. Did she present enough evidence to support her claims?

Background: Sharda Garg was employed by Macomb County Community Mental Health as a staff psychologist. According to Garg, in 1981 she witnessed her supervisor, Donald Habkirk, snapping a female employee's bra strap and snapping the elastic on another female employee's underwear. Around the same time, Garg said, she was walking down a corridor when she felt someone touch her on the shoulder; she reflexively turned and struck the person who touched her, who turned out to be Habrick. She did not report the incident to her union or file a grievance against Habrick for touching her. Two years later, Garg sought but was denied a promotion. In 1987, Garg, who is of Indian ancestry, filed a grievance alleging that her employer discriminated against her on the basis of her national origin. Because she filed that grievance, her employer repeatedly denied her requests for promotion, Garg claimed.

Garg sued Macomb Mental Health, alleging national origin discrimination, and contending that her employer retaliated against her for filing the 1987 grievance. She also claimed that her employer retaliated against her for opposing sexual harassment. Her theory was that she demonstrated her opposition to Habrick's conduct when she struck him. The jury found that Garg had no cause of action on her national origin discrimination claim, but returned a verdict of $250,000 on Garg's retaliation claims. Macomb Mental Health appealed, arguing that Garg had failed to present a prima facie case – enough evidence to support her claims – and that

her claims should have been dismissed. Macomb Mental Health contended in part that there was no evidence to show that Garg, by striking Halbrick, opposed sexual harassment, or that the incident was related to her being denied a promotion. The evidence also failed to show any causal relationship between the 1987 grievance and the continued denial of promotions, Macomb Mental Health argued. In an unpublished per curiam opinion, the Court of Appeals disagreed, saying that reasonable jurors could differ on whether Garg presented sufficient evidence and that the trial court properly denied Macomb Mental Health's post-trial motions to strike Garg's claims. Macomb Mental Health appeals.

Afternoon session

DUVERNEY, et al. v. BIG CREEK-MENTOR UTILITY AUTHORITY, et al. (case no. 123163)
Attorney for plaintiffs Dale L. Duverney, et al: Gregory C. Schmid/(989) 799-4641
Attorney for defendant Big Creek-Mentor Utility Authority, et al.: Gerard F. Brabant/(989) 275-4365
Trial court: Michigan Court of Appeals (original action)
At issue: The plaintiffs in this case are taxpayers opposing charges for them to connect to a sewer system and to pay for capitalization and maintenance of the system. Do the charges amount to a tax without a vote of the people, in violation of the Headlee Amendment?
Background: The Big Creek-Mentor Public Water and Sewer Service Ordinance was adopted by defendants Big Creek-Mentor Utility Authority, the Township of Mentor, and the Township of Battle Creek on September 17, 2001. Section 4(H) of the ordinance provides that all premises requiring sewage disposal service that are within 200 feet of a public sewer main must connect to the system within three years of its installation. Section 4(A) provides that all properties connected to the system "shall be subject to the payment of such water and/or sewer rates and charges as shall be determined by the utility authority board." Charges included a mandatory connection fee. Violations of the ordinance were punishable by a $100-per-day fine, and any delinquent rates and charges would result in a lien on the premises served by the system. A group of taxpayers brought an original action in the Court of Appeals, arguing that the ordinance was a "user fee" scheme "designed to characterize a tax as a user fee, and that enforcement efforts and provisions constitute imposition of a tax upon the plaintiffs and others similarly situated without a vote of the people" in violation of the Headlee Amendment to the Michigan Constitution. The Court of Appeals denied their claim in an order, stating that "Plaintiffs' complaint and supporting documentation is wholly insufficient to persuade this Court that the challenged charges constitute a tax." The plaintiffs appeal.

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